U.S. Department of Labor

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CASE NOS. 2001-LHC-01245
2001-LHC-01289

OWCP NOS. 01-150361
01-150404

In the Matter of

MICHAEL J. REID
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insurer

Appearances:

Janmarie Toker, Esquire (McTeague, Higbee, Case, Cohen, Whitney & Toker), Topsham, Maine, for the Claimant

Kevin M. Gillis, Esquire (Troubh, Heisler & Piampiano), Portland, Paine, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from claims for worker's compensation benefits filed by Michael J. Reid (the Claimant) against the Electric Boat Corporation (the Employer), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the claims were referred to the Office of Administrative Law Judges where they were consolidated for hearing by order of the Chief

Administrative Law Judge issued on August 13, 2001. Administrative Law Judge Exhibit 5.[1] Pursuant to notice, a formal hearing which was conducted before me in Portland, Maine on November 6, 2001, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The Claimant testified at the hearing, and documentary evidence was admitted at the hearing without objection as Claimant's Exhibits CX 1-13 and Employer's Exhibits EX 3-5. TR 10, 13. The Claimant objected to the admission of Employer's Exhibits EX 1 and 2, and the objection was taken under advisement for a post-hearing ruling. TR 13. At the close of the hearing, the record was held open until January 7, 2002 to allow the parties to offer additional testimony by post-hearing deposition and to submit written closing argument. TR 33. By letter dated January 7, 2002, the Employer offered the transcript of the testimony of Dee Bisson which was taken at a deposition on December 17, 2001. No objection has been voiced by the Claimant, and the deposition transcript has been received in evidence as Employer's Exhibit EX 6. By agreement of the parties, the time for submission of closing argument was enlarged one week. Both parties timely filed their written closing argument, and the record is now closed.

After careful analysis of the evidence contained in the record I conclude that the claims were timely filed and that the Claimant is entitled to an award of permanent partial disability compensation under the Act for permanent partial loss of his arms and legs due to work related injuries, interest on unpaid compensation, medical care and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At the hearing, the parties stipulated that: (1) there was an employer-employee relationship between the Employer and the Claimant at all pertinent times; (2) the claims are covered under the Act; (3) the Claimant sustained an injury to his upper extremities which arose out of and in the course of employment on March 4, 1992; (4) the Claimant's average weekly wage on March 4, 1992 was $452.42; and (5) the Claimant's average weekly wage as of September 16, 1997 was $622.59. TR 9.

The Employer contends that the both claims are barred by section 13(a) of the Act because they were filed outside of the one-year limitation period running from the date of injury. Assuming that the claims are timely, the Employer alternatively raises the following issues: (1) the extent of disability involving the Claimant's upper extremities; (2) whether the Claimant sustained a compensable injury to his knees on September 16, 1997; and (3) the extent of disability related to the alleged knee injury.

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[1] Documentary evidence will be referred to herein as "CX" for an exhibit offered by the Claimant, "EX" for an exhibit offered by the Employer, "JX" for a joint exhibit, and "ALJX" for the formal papers. References to the hearing transcript will be designated as "TR".

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant was born on April 13, 1960 which made him 41 years old at the time of the hearing. He completed the 12th grade and is married with three stepchildren. He has been employed by the Employer for over 15 years as a welder. He is ambidextrous. TR 17-18. He testified that he operates a welding machine for the Employer which required him to repeatedly pull a trigger. He stated that he also used a variety of vibrating pneumatic tools with both hands, and he performed work in awkward positions. TR 18-19. By March 1992, he was experiencing numbness in his fingers which ran into his hands and arms, though he did not lose any time from work until later. TR 19. He subsequently underwent two carpal tunnel release procedures to relieve his hand and arm symptoms, on May 25, 1995 (left) and on January 31, 1996 (right). He missed six weeks of work after the first surgery and eight weeks after the second, and he stated that the Employer was aware of his condition and paid him benefits under the State of Maine Workers' Compensation Act. TR 19-20.

After undergoing the carpal tunnel release procedures, the Claimant returned to work for the Employer as a welder. He testified that he continued to experience problems with his hands including cramping, occasional tingling in the fingers and difficulty holding his hands in awkward positions. He also testified that the Employer made some accommodations for his condition such as providing him with a foot pedal to operate the welding machine on some jobs and allowing him to stop using pneumatic tools. TR 21.

The Claimant further testified that he spends about 90 percent of the workday on his knees. He stated that he is aboard ships all day and has to crawl and climb ladders. TR 21-22. Regarding the condition of his knees, he testified that he has daily pain in his right knee which "snaps quite often" and "has a lot of grating inside" when he squats. TR 23. He stated that his left knee is about the same as the right and that both knees have gotten worse over the years, but he did not believe that he has not lost any time from work due to his knees. TR 23-24. Although he has had constant pain, he stated that he did not know that he had any permanent injury to his knees until he saw Dr. Caldwell. He said that he knew that there was something wrong but did not know how permanent the problem would be. TR 24.

The Claimant said he first began to notice these knee problems around 1990. TR 26. He also testified that he injured his right knee in January 1995 when he twisted it on a staging, and he recalled other minor injuries to this knee prior to 1995 but said that any symptoms from these earlier injuries usually subsided. TR 26-27. The Claimant testified that he reported problems with his left knee to the Employer about one month after his right knee injury in 1995, explaining that he was favoring his right knee at the time, and he stated that he has had continuous problems with both knees since 1995. TR 27-28.

In September 1997, the Claimant went to the Employer's first aid department because he said that he was experiencing a lot of knee symptoms from kneeling during the preceding few

months. TR 28. He acknowledged that he previously injured one of his knees (he could not recall which one) in 1993 while playing with his dog. He received treatment for this injury from Dr. Mendes, his primary care physician, who kept him out of work for about one week. TR 29. He returned to work on a bench job for about three weeks before he recovered and resumed his regular duties. TR 29-30. He said that the symptoms from the January 1995 right knee injury lasted "quite a while" and that his knees have gotten steadily worse since that time. Finally, he testified that he reported injuries to both knees in September 1997 because "[t]hey were just bothering me to the point where I just on a normal daily basis, I just couldn't stand working on the steel, crawling around on my knees." TR 30.

The Claimant has filed two claims which are at issue in this proceeding. On July 23, 2000, he filed a claim (OWCP File No. 01-150404) alleging that he had sustained a work-related injury, described as bilateral carpal tunnel, on March 4, 1992. CX 4 at 6-7. One day later on July 24, 2000, he filed a second claim (OWCP File No. 01-150361) in which he alleged that he sustained a work-related injury, described as a gradual injury to both knees from repetitive kneeling, on September 16, 1997. *Id.* at 9-10.

B. Timeliness of the Claims

Section 13(a) of the Act bars a claim for compensation unless it is filed within one year of the injury or death or, in cases where there has been a voluntary payment of compensation, within one year after the date of the last payment. 33 U.S.C. §913(a). Section 13(a) further provides that "the time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." *Id*. Since it is presumed pursuant to section 20(b) of the Act that sufficient notice of a claim has been given, the burden is on the Employer to demonstrate that the claims were filed more than one year after the dates on which the Claimant became aware, or by the exercise of reasonable diligence should have been aware, of the relationship between his injuries and his employment. *See Horton v. General Dynamics Corp.*, 20 BRBS 99, 102 (1987).

1. The July 23, 2000 Claim for the March 4, 1992 Upper Extremity Injury

The Employer points out the claim based on the upper extremity injuries was not filed until July 23, 2000, more than eight years after the stipulated injury date of March 4, 1992. Noting that the Claimant underwent two surgical procedures in 1995 and 1996, lost time from work after each surgery and received voluntary compensation payments, the Employer argues that it is obvious that the Claimant was aware of the relationship between the injury and his employment, and that he was additionally aware that the injury had caused and was likely to cause impairment of his earning capacity, years before July 2000. Employer's Post-Hearing Brief at 4. The Employer also urges rejection of the Claimant's argument that the running of the limitation period is tolled by the provisions of section 30(f) of the Act because the Employer failed to file a

form LS-202, Employer's First report of Injury or Occupational Illness.[2] In this regard, the Employer has offered a LS-202 dated March 20, 1992 for the Claimant's reported March 2, 1992 accident which is described as "tingling in the wrists" (EX 1) and a Notice of Controversion, also dated March 20, 1992, stating that the Claimant is pursuing a claim under the state act (EX 2). In response to the Claimant's objection at the hearing, the Employer introduced the deposition of Dee Bisson, a claims examiner for the Employer, who testified that she prepared these two documents and signed them for the claims adjuster and that it was standard procedure in 1992 to file the Employer's First Report of Injury with both the OWCP and the state workers' compensation agency. EX 6 at 4-6. Ms. Bisson further testified that virtually all work-related injuries at Bath Iron Works during this time period were administered under the Maine workers' compensation act, and it was for that reason that the Notice of Controversion would have been filed with the OWCP to indicate that the claim was being pursued under the state act, so that no payments would be made under the federal Act. *Id.* at 6-7. She testified that the only purpose of preparing these documents would have been to file them with the OWCP, and that she routinely filed documents of this type with OWCP. *Id.*[3] Based on Ms. Bisson's uncontradicted testimony, I find that the Employer filed a First Report of Injury concerning the Claimant's upper extremity injuries on March 20, 1992.

The Claimant counters that, even assuming that the Employer did file a LS-202 in 1992, its report did not comply with the requirements of section 30(a) because it was filed before the Claimant lost any time from work due to his upper extremity injury. Thus, the Claimant contends that the tolling provisions of section 30(f) are applicable since the Employer has never complied with the requirements of section 30(a). Claimant's Closing Argument at 4, citing *Nelson v. Stevens Shipping and Terminal Co.*, 25 BRBS 277 (1982) (*Nelson*). On cross-examination at her

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[2] Section 30(a) of the Act contains a requirement that an employer file a report of injury or death, and subsection (f) provides that the section 13(a) limitation period will be tolled by an employer's failure to comply with the reporting requirement:

> (f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of any employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of the section, the limitations in subdivision (a) of section 13 of this Act shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

33 U.S.C. §930(f).

[3] Ms. Bisson's testimony adequately authenticates these documents. Accordingly, the Claimant's objection is overruled, and EX 1 and EX 2 have been admitted into evidence.

deposition, Ms. Bisson testified that the LS-202 (EX 1) and controversion form (EX 2) were the only forms filed with the Department of Labor in connection with this claim, that no report was ever filed indicating that the Claimant had lost time and that the Claimant later did lose time from work. EX 6 at 9. Based on this testimony, I find that the Employer filed the LS-202 concerning the Claimant's March 4, 1992 upper extremity injury before he lost any time from work due to this injury. I further find the Employer never subsequently filed any new or amended injury report with respect to the March 4, 1992 upper extremity injury indicating that the Claimant had lost time from work as a result of this injury.

On these facts, I find, in agreement with the Claimant, that the Employer's March 20, 1992 LS-202 did not satisfy the requirements of section 30(a). In *Nelson*, which involved facts substantially identical facts to the instant case, the Benefits Review Board held that a LS-202 filed before the claimant lost time from work is "incomplete and inaccurate" and, therefore, "does not comply with the requirements of Section 30(a) so as to commence the running of the time limits of Section 13(a) and that the failure to file a correct report is tantamount to filing no report at all." 25 BRBS at 283-284, citing *Belton v. Traynor*, 381 F.2d 82, 87 (4th Cir. 1967). The Board further held that because the employer did not amend its existing LS-202 or file another LS-202 once the injury resulted in a loss of work time, it failed to comply with section 30(a) which tolls the running of the section 13(a) limitation period pursuant to the provisions of section 30(f). 25 BRBS at 284. In this case, the Employer also failed to either amend the LS-202 it filed on March 20, 1992 or file a new LS-202 when the Claimant lost time from work after the carpal tunnel release surgeries in 1995 and 1996. Consequently, I conclude in accordance with *Nelson* that the limitation period was tolled by section 30(f) and that the claim was timely filed.[4]

2. The July 24, 2000 Claim for the September 16, 1997 Knee Injury

In support of its contention that the knee claim is untimely under section 13(a), the Employer notes that there is no evidence that the Claimant lost any work time because of any work-related knee injury, and there is no reason to believe that he was ever paid any compensation for a knee injury and certainly not within one year of the July 24, 2000 filing date. In the absence of any lost work time, the Employer asserts that the reporting requirements of section 30(a) and the tolling provisions of section 30(f) are inapplicable. The Employer further notes that the record shows that the Claimant had been experiencing problems with his knees

[4] In view of this disposition of the timeliness issue, I need not reach the question, which was not raised by the parties, of whether the Claimant's carpal tunnel syndrome qualifies as a occupational disease that is subject to the longer limitation period established by section 13(b)(2) of the Act. *Cf. Carlisle v. Bunge Corp.*, 33 BRBS 133, 138 (1999) (carpal tunnel syndrome is a condition with a delayed onset that qualifies as an occupational disease for section 13(d)(2)'s special limitation period), *aff'd Bunge Corp. v. Carlisle*, 227 F.3d 934 (7th Cir. 2000).

since 1995[5] and that he was under work restrictions in 1995, and again in 1997, because of his knee complaints. The Employer submits that section 13(a), as interpreted by the Board and the courts, requires that a claim be filed within one year of the date on which the employee is aware of a work-related injury and the likelihood that the injury will impair earning capacity. Since the record shows that the Claimant had the requisite awareness by 1997, the Employer contends that his claim filed three years later in July 2000 must be rejected as untimely. Employer's Post-Hearing Brief at 9-10.

Although the Claimant has not specifically responded to the Employer's timeliness arguments, he has alleged in his claim that he had suffered a "gradual injury to knees from repetitive kneeling." CX 4 at 9.[6] I construe this as a claim that his knee condition qualifies as an occupational disease within the meaning of section 13(b)(2) of the Act which provides that "a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, or within one year of the date of the last payment of compensation, whichever is later." 33 U.S.C. §913(b)(2).

An occupational disease has been defined as "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Carlisle v. Bunge Corp*., 33 BRBS 133, 136 (1999), *aff'd Bunge Corp. v. Carlisle*, 227 F.3d 934 (7th Cir. 2000), citing *LeBlanc v. Cooper/T. Smith Stevedoring, Inc*., 130 F.3d 157, 160 (5th Cir. 1997) (quoting *Gencarelle v. General Dynamics Corp*., 892 F.2d 173, 176 (2nd Cir. 1989) and 1B A. Larson, THE LAW OF WORKMAN'S COMPENSATION §41.00 at 7-353). In *Gencarelle*, the Second Circuit ruled that chronic synovitis of the knees caused by repeated bending, stooping, squatting and climbing was not an occupational disease because the claimant's work activities as a maintenance worker were not peculiar to his employment, observing that many occupations require repeated bending, stooping, squatting and climbing. 892 F.2d at 177. The Fifth Circuit similarly held in *LeBlanc* that degenerative facet disease, which was diagnosed after the claimant feel from a ladder injuring his back, was not an occupational disease because the claimant's work activities of lifting, bending, and climbing ladders is typical of many occupations and was not peculiar to the claimant's employment. 130 F.3d at 157. In *Carlisle*, the Board carefully reviewed the development of the law regarding occupational diseases and concluded that a condition "must at the very least be produced or aggravated by the *distinctive* conditions or exertions of employment" to qualify as an occupational disease. 33 BRBS at 137 (italics in original). The

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[5] Actually, the Claimant testified that he first began experiencing problems with his knees around 1990 and suffered the twisting injury to the right knee at work in 1995. TR 26-27.

[6] It is noted that the Employer raised timeliness of the knee claim as an issue before the OWCP; *see* ALJX 2A (Employer's Pre-Hearing Statement).

Board further held that "while the general state of workers' compensation law appears to be broadening the definition of 'occupational diseases,' it remains necessary for an individual to show more than he/she has a disease process which 'arose naturally out of his employment,' in order for their malady to fall within the definition of an 'occupational disease,' and thus, within the extended statute of limitations at Section 13(b)." *Id*. (internal quotations in original).[7]

The Claimant's treating orthopedic physician, John B. Ayres, M.D., has diagnosed the Claimant's knee condition as bilateral anterior knee pain syndrome. CX 12 at 211-212, 214. G.T. Caldwell, M.D., a consulting physical and rehabilitation medicine specialist, provided a diagnosis of bilateral patellofemoral syndrome, and stated that he believed that this condition is causally related to the Claimant's work which involves "a lot of squatting and/or kneeling and climbing up and down ladders. CX 9 at 25. Christopher R. Brigham, M.D., a consulting orthopedic specialist retained by the Employer, concurred with Dr. Caldwell's diagnosis of bilateral patellofemoral syndrome, which he also associated with "repetitive tasks of kneeling and working on his knees on solid surfaces." EX 5 at 24.
This evidence clearly supports a finding that the Claimant suffers from a disease process in his knees that arose naturally out of his employment. However, there is nothing in the medical records or elsewhere in the record, including the Claimant's testimony about his job duties, that the Claimant's bilateral patellofemoral syndrome was produced or aggravated by the conditions or exertions of employment that are peculiar to his occupation. That is, there is nothing in the record which shows that the kneeling, stooping, squatting and climbing activities that the Claimant is required to perform as a welder is any more unique to his job than they were to the jobs in *Gencarelle* and *LeBlanc*. In the absence of such evidence, I conclude that the Claimant has not established that his knee condition is an occupational disease which qualifies for the extended filing period under section 13(b)(2). Therefore, the Claimant must satisfy the timeliness requirements of section 13(a).

The courts of appeals have unanimously held that the filing limitation period in section 13(a) begins to run "only after the employee becomes aware or reasonably should have become aware of the full character, extent, and impact of the injury" and they have "generally have held that the employee is aware of the full character, extent, and impact of the injury when the employee knows or should know that the injury is work-related, and knows or should know that the injury will impair the employee's earning power." *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 134 (6th Cir. 1996), citing *Abel v. Director, Office of Workers Compensation Programs*, 932 F.2d 819, 821 (9th Cir.1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 27 (4th Cir.1991); *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 294-95 (D.C. Cir.1990); *J.M. Martinac Shipbuilding v. Director, Office of Workers' Compensation Programs*, 900 F.2d 180, 183 (9th Cir.1990); *Brown v. Jacksonville Shipyards, Inc*., 893 F.2d 294, 296 (11th Cir.1990); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 1033 (D.C. Cir.1987); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141-42 (5th Cir.1984);

[7] As noted above, the Board in *Carlisle* found that the claimant's carpal tunnel syndrome constituted an occupational disease.

Cooper Stevedoring, 556 F.2d at 274. *See also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585 (1st Cir.1979) (interpreting identical language in 33 U.S.C. § 912 which contains the Act's notice of injury requirement). In *Thompson*, the Claimant suffered work-related back injuries and missed time from work on four occasions during the 1970's, but he returned to work after each of these injuries. He eventually filed a claim in 1984 within a year of receiving a diagnosis of herniated discs that required surgery. In affirming the ALJ's finding that the claim was timely filed under section 13(a), the Court held that the "impairment standard" for determining an employee's date of awareness "does not require employees to protect their rights by filing claims for aches and pains that are not disabling and thus not compensable." 82 F.3d at 134.[8] The Court rejected the employer's arguments that the claimant should have been aware of the possibility of future earnings loss after losing time from work after his earlier back injuries, noting that this argument overlooks the distinction between temporary and permanent disability, and it held that "experiencing pain after an accident, particularly when that pain does not prevent the employee from working, does not put the employee on notice of a likely impairment of long-term earning capacity." *Id.* at 135, citing *Newport News*, 935 F.2d at 27 ("[T]he experiencing of pain after an accident is insufficient as a matter of law to establish an awareness of a likely impairment of earning power.").

The record in this case contains ample evidence that the Claimant has a long history of knee pain dating to the early 1990s. The evidence also shows that he has was seen frequently at the Employer's first aid clinic for complaints of knee pain beginning with the twisting injury involving his right knee on January 9, 1995 (CX 10 at 96-104), that the first aid clinic diagnosed him with chronic work-related patellofemoral knee pain in February 1995 and placed him on temporary work restrictions (CX 10 at 104-105) and that Dr. Ayres placed him back on kneeling, crawling and stooping restrictions in 1996. CX 12 at 214. Based on this evidence, I find that the Claimant was aware that he had work-related knee problems by 1995 and that he knew, or should have known, by 1996 that his knee problems were chronic in nature. However, the record also

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[8] The *Thompson* Court cited the following language from the First Circuit's decision in *Galen* regarding the notice requirements of section 12(a) as supporting the conclusion that a worker is not required by section 13(a) to file a claim until he or she is aware of an impairment in earning capacity:

> Since the Act exists to compensate a worker for loss of earning power, there is little purpose in penalizing a claimant for not reporting a pain he reasonably did not believe would impair his earning power. A rule requiring earlier notice would force employees to report every ache and sore throat that might lead to eventual disability.

Galen, 605 F.2d at 586. Although the First Circuit, in whose jurisdiction the instant claims arise, has not expressly addressed the awareness criterion of section 13(a), I find that its treatment of the identical language of section 12(a) is consistent with my application of the impairment of earnings standard in this case.

shows that the Claimant never lost any work time due to his knee condition, and there is no evidence that his knee-related the work restrictions have caused any diminution of his earnings. Moreover, the Claimant credibly testified that he was not aware that he had a permanent knee injury until he saw Dr. Caldwell in November 2000. On these facts, I find that the Claimant was not aware of the full character, extent, and impact of his knee injury until November 2000. The fact that he did not lose any time from work due to the knee injury is significant and eviscerates the Employer's contention, in the absence of any evidence that the Claimant knew of should have been aware that his knee pain and work restrictions could impair his earning capacity, that he was required by section 13(a) to file his claim earlier. *See Brown v. Jacksonville Shipyards*, 893 F.2d 294, 296 (11th Cir. 1990). Accordingly, I find that the claim for compensation based on the bilateral knee injury was timely filed on July 24, 2000.

C. Injuries Arising out of and in the Course of Employment

The Employer has stipulated that the Claimant's March 4, 1992 carpal tunnel injury is work-related, but it asserts that he did not suffer any knee injury on September 16, 1997 as alleged in his claim, and it further asserts that the claimed permanent partial disability of the knees is unrelated to any injury on September 16, 1997. Employer's Post-Hearing Brief at 10-11. Thus, the existence of a work-related knee injury and resulting disability are placed in issue.

A claimant seeking benefits under the Act must, as a threshold matter, establish that he suffered an "accidental injury . . . arising out of and in the course of employment." 33 U.S.C. 902(2); *Bath Iron Works v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). A claimant need not show that he has a specific illness or disease in order to establish that he has suffered an injury under the Act, but need only establish some physical harm; *i.e.*, that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991). A claimant is aided in this regard by section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976) (*Swinton*), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982) (*U.S. Industries*). A claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Brown*, 194 F.3d at 4, citing *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959 (9th Cir.1998) and *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986).

The Claimant credibly testified that he suffered injuries while at work for the Employer which produced harm to both knees. That this harm is related to his employment is fully supported by the medical evidence. As discussed above, the Employer's first aid clinic and Drs. Caldwell and Brigham, the consulting experts respectively retained by the Claimant and the

Employer, all found that the Claimant has suffered an injury to his knees that is related to his employment. Accordingly, I conclude that he has successfully carried his burden of establishing a *prima facie* case that he suffered an injury to his knees which arose out of and in the course of employment.

Where a claimant makes a *prima facie* showing of harm or pain and the existence of working conditions which could have caused or aggravated the harm or pain, the party opposing entitlement must produce substantial evidence severing the presumed connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Director, OWCP,* 109 F.3d 53, 56 (1st Cir. 1997). *See also Swinton*, 554 F.2d at 1082 (burden is on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment); *American Grain Trimmers v. Office of Workers' Compensation Programs*, 181 F.3d 810, 815-17 (7th Cir. 1999) (*Grain Trimmers*); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1981). Evidence is "substantial" if it is the kind that a reasonable mind might accept as adequate to support a conclusion. *John W. McGrath Corp. v. Hughes*, 264 F.2d 314, 316 (2nd Cir. 1959), *cert. denied*, 360 U.S. 931 (1959).

In support of its contention that the Claimant did not suffer any injury to his knees on September 16, 1997, the Employer adverts to the fact that he injured his right knee in January 1995, began to complain of continuous left knee problems in February 1995 and continued to complain of knee problems since that time. Employer's Post-Hearing Brief at 10-11. The Employer also argues that there is no evidence that the Claimant suffered any new injury on September 16, 1997 and that the evidence instead "simply shows that the Claimant continued to have the same problems with his knees at that time that he had experienced for the previous two and one-half years." *Id.* at 11. Finally, the Employer points to the opinion of Dr. Brigham (EX 5) that the Claimant's permanent impairment was likely present when the diagnosis of patellofemoral syndrome was first made in 1995 and that any work activity through September 16, 1997 made no difference to the permanent impairment. Thus, the Employer states that because "there is no cause and effect relationship between the permanent impairment assessed and an injury of September 16, 1997, as the same permanent impairment pre-existed that date and was not changed by any work activity through September 16, 1997 . . . the claim for a scheduled award should be denied." *Id.* at 11.

The Employer's arguments that the claim must be denied if the evidence fails to establish that a discreet knee injury occurred on September 16, 1997 is similar to the argument that it made two decades ago and had rejected in *Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981). In *Gardner*, the ALJ found that the claimant's conditions of his employment at aggravated his preexisting bilateral venous insufficiency so as to render him disabled, thereby causing a compensable injury within the meaning of the Act. The Board affirmed, and one of the Employer's arguments on appeal to the First Circuit was that the claimant had not suffered any compensable accidental injury because "in order for an injury to be 'accidental' it must have either an unexpected cause or an unexpected result and that either the cause or the result must be traceable to a definite time." 640 F.2d at 1388. The Court rejected the Employer's arguments,

finding "no significance to the distinction which Bath attempts to draw between acceleration of the underlying disease process and a mere manifestation of symptoms" and holding that it was there was substantial evidence to support the ALJ's finding that the claimant's work activities aggravated his condition and thereby produced a compensable injury. 640 F.2d at 1389. While Dr. Brigham did state in his report that it is unlikely that the Claimant's knee condition is attributable to any acute injury and that it is "probable" that his work activities between January 6, 1995 and September 16, 1997 did not affect the degree of impairment, he also concluded, as did Dr. Caldwell, that the gradual onset of the Claimant's knee problems is causally related to his work. EX 5 at 25. Thus, there is no doubt on this record that the Claimant suffered an injury to his knees that arose out of and in the course of his employment. Since this is not a case involving a question as to which among multiple employers is liable for benefits, I find that whether the injury occurred on a specific date such as September 16, 1997, or gradually over a period of years, is of no import in determining whether he suffered a work-related injury. *Cf. McKnght v. Carolina Shipping Co.*, 32 BRBS 165, 167 (in cases involving multiple injuries and multiple employers, determination of the responsible employer turns on whether the claimant's condition is a result of the natural progression or aggravation of a prior injury), *aff'd on recon. en banc*, 32 BRBS 251 (1998).[9] The Act does not require great precision or sophistication in stating a claim, and it certainly does not envision dismissal as a penalty for mispleading the date of injury. The only requirement is that a claim be in writing and sufficient to disclose an intention to assert a right to compensation. *See e.g. Employers Liability Assurance Corp. v. Donovan*, 279 F.2d 76, 78 (5th Cir. 1960). I find that the Claimant clearly satisfied this requirement when he filed a claim for compensation on July 24, 2000, stating that he had suffered a gradual injury to both knees from repetitive kneeling. CX 4 at 9-10. I further find that the Employer has offered no evidence to rebut the presumption that the Claimant's knee injury was caused by his employment, and I consequently conclude that the Claimant has met his burden of establishing that he suffered an injury to his knees which arose out of and in the course of his employment.

D. Nature and Extent of the Claimant's Disabilities

The Claimant seeks awards of permanent partial disability compensation under the schedule established by section 8(c) of the Act for the partial loss of the use of his arms due to carpal tunnel syndrome and for the partial loss of the use of his legs resulting from his bilateral patellofemoral syndrome. Specifically, he requests awards for a ten percent impairment of each arm and leg based on Dr. Caldwell's evaluation. Claimant's Closing Argument at 5-7. The fact that the Claimant continues to work for the Employer does not affect his potential entitlement to such awards because an employee with a scheduled injury is presumed to be disabled, even though the injury does not actually affect his earnings. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 143-44 (2nd Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). The Employer counters that if any awards of permanent partial disability compensation are found to be warranted, the awards

[9] As discussed *infra*, the date of injury is relevant for purposes of determining the applicable average weekly wage on which compensation payments are based. *See generally Bath Iron Works Corp. Director, OWCP*, 506 U.S. 153, 155-58 (1993).

should be based on Dr. Brigham's assessments of a sixteen percent impairment of the right arm, a two percent impairment of the left arm and five percent impairments for each leg. Employer's Post-Hearing Brief at 5-6, 12.

Regarding the extent of the Claimant's arm impairments resulting from carpal tunnel syndrome, Dr. Caldwell stated,

> In my estimation he has bilateral carpal tunnel syndrome that is mild. This is addressed by table 16 on page 57 of the AMA *Guides to the Evaluation of Permanent Impairment*. Ten percent upper extremity is assigned for each arm. Therefore, he has a 19% upper extremity impairment when combining 10 plus 10 using the combined values chart. Using table 3, 19% upper extremity impairment equals 11% whole person impairment. Therefore, he is assigned 11% whole person impairment based on bilateral carpal tunnel syndrome.

CX 9 at 25. Dr. Caldwell next addressed the extent of the Claimant's disability resulting from his knee condition, stating,

> The condition in his knees is patellofemoral syndrome. This is a form of arthritis in the joint between the kneecap and the rest of the knee. The AMA *Guides to the Evaluation of Permanent Impairment* addresses this syndrome on pages 82 and 83. However, x-ray is required. I do not find any x-ray reports of the patellofemoral joint. I would recommend that he have x-rays to determine what is known as the cartilage interval. This helps establish an objective basis for the condition of arthritis at that joint. If he wants this done, then I can order it for him and assign a specific whole person and lower extremity impairment. Short of this, my impression is that he has mild to moderate patellofemoral syndrome and this would equal 4% whole person impairment for each leg, I derive this from table 62. The lower extremity impairment is 10% and when added to 10% for the other knee, this equals 19% lower extremity impairment. The whole person impairment would be 8%.

Id. at 26. Dr. Caldwell also stated that it is his opinion that the Claimant's carpal tunnel syndrome has reached a point of maximum medical improvement. However, he did not indicate when he felt that the Claimant reached that point, and he did not discuss whether the Claimant's knee condition had reached maximum medical improvement. *Id.* at 25. As mentioned earlier, Dr. Caldwell is board-certified in physical medicine and rehabilitation.

Dr. Brigham agreed that the Claimant has reached a point of maximum medical improvement with respect to his carpal tunnel and patellofemoral syndromes, but he too did not indicate when the Claimant reached maximum medical improvement. EX 5 at 25. Concerning the degree of impairment caused by the Claimant's carpal tunnel syndrome, Dr. Brigham initially criticized Dr. Caldwell's use of Table 16 in the AMA *Guides to the Evaluation of Permanent Impairment*, stating that it provides an alternate and non-preferred methodology for

assessing carpal tunnel syndrome, and he provided the following explanation of how carpal tunnel should be assessed under the Guides:

> The entrapment neuropathy table, Table 16 (4th ed., 57), is not a new way to rate nerve injury, but rather, summarizes the calculations of common impairments. The problem with this Table, used by Dr. Caldwell, is that definitions are not provided to grade severity. The process of assessing impairment involves objectifying any sensory component and motor component. This is best done by grading the severity using Table 11, Determining Impairment of the Upper Extremity Due to Pain or Sensory Deficit (4th ed., 48) and Table 12, Determining Impairment of the Upper Extremity Due to Loss of Power and Motor Deficits (4th ed., 49). Decreased sensibility is required to have a sensory deficit, e.g. pain alone is not ratable. These deficits are then multiplied by the values for the Median Nerve (below midforearm) provided in Table 15, Maximum Upper Extremity Impairments . . . of the Major Peripheral Nerves (4th ed., 54), e.g. 38% upper extremity impairment due to sensory deficit or pain and 10% due to motor deficit.

Id. at 26. Using these tables, Dr. Brigham stated that the Claimant had sixteen percent impairment of his right upper extremity which converts to a whole person permanent impairment. *Id.* Regarding the left arm, Dr. Brigham noted that the Claimant has subjective complaints but no objective evidence of sensory, strength or neurological loss to form the basis of a ratable impairment. Nevertheless, he stated that based on the fact that the Claimant had undergone carpal tunnel release surgery, he would assign him a left upper extremity permanent impairment rating of two percent. *Id.*

Turning to the Claimant's patellofemoral syndrome, Dr. Brigham reviewed the applicable sections of the AMA Guides and concluded, as Dr. Caldwell appears to have concluded, that the section dealing with arthritic conditions of the knee joint provides the appropriate guidance for rating the Claimant's lower extremity impairment which he assessed at five percent for each leg. *Id.* at 26-27. Dr. Brigham noted that his assessment differed from Dr. Caldwell's, and he provided the following comments:

> My assessment differs from that of Dr. Caldwell. He states that "my impression is that he has mild to moderate patellofemoral syndrome and this would equal "4% whole person impairment for each leg". He does not make reference to cartilage intervals. The usual customary process of assessing patellofemoral pain is given in the footnote as described above and this is a 5% not a 10% lower extremity impairment. As explained above I would relate this impairment to the gradual onset injury to his knees. To a reasonable degree of medical probability is his impairment for his lower extremities would have been the same, e.g. with documentation of the patellofemoral syndrome, prior to January 6, 1995 regardless of his work activities through September 16, 1997.

Id. at 27. Dr. Brigham is board-certified in occupational medicine and family practice. In addition, he is the Founding Director of the American Board of Independent Medical Examiners, and he is a certified independent medical examiner. He also is the Editor-in-Chief of the AMA Guides Newsletter, the Editor of *The Guides Casebook* (the AMA companion textbook to the *Guides*, Fourth Edition), and he has trained thousands of physicians on how to use the AMA *Guides*. He has published and spoken extensively on independent medical examinations, and he is the author of two of the primary texts on independent medical examinations. *Id.* at 27-28.

Dr. Brigham's evaluation is considerably more thorough, and his explanation of the methodology employed to arrive at his impairment ratings is far more detailed, than the evaluation and conclusions offered by Dr. Caldwell. Moreover, his impressive qualifications and experience in the evaluation of impairments add persuasive weight to his opinions. Based on these distinguishing factors, and noting that Dr. Caldwell is not a treating physician and only examined the Claimant on one occasion which provided him with no greater insight than Dr. Brigham into the Claimant's medical condition, I have given greater weight to the ratings assigned by Dr. Brigham. Accordingly, I find that the Claimant has suffered a sixteen percent loss of the use of his right arm, a two percent loss of the use of his left arm and a five percent loss of the use of each leg.

Although there is no conflict in the medical opinions that the Claimant's conditions have reached maximum medical improvement and that his disabilities resulting from these conditions are permanent, none of the doctors have indicated when they believe the Claimant's arm and leg impairments became permanent. This must be addressed because entitlement to benefits for a scheduled permanent partial disability begins on the date of permanency. *Turney v. Bethlehem Steel Corp*., 17 BRBS 232, 235 (1985). To be considered permanent, a disability need not be eternal or everlasting; it is sufficient that the "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781 (1st Cir. 1979), citing *Watson v. Gulf Stevedoring Corp*., 400 F.2d 649, 654 (5th Cir. 1968).

The records from Dr. Ayres, the Claimant's treating orthopedic surgeon show that he underwent carpal tunnel release surgeries in May 1995 (left) and January 1996 (right) release. CX 12 at 205, 207. He underwent physical therapy after these procedures and was returned to work by Dr. Ayres with light duty restrictions on March 27, 1996. *Id*. at 208. On August 1, 1996, Dr. Ayres released the Claimant to regular duty, stating that any residual pain in the right wrist should improve with time. *Id*. at 209. Noting that the more recent evaluations by Drs. Caldwell and Brigham indicate that the Claimant's upper extremity symptoms, especially on the right, did not completely resolve with time, I find that his upper extremity disability became permanent on August 1, 1996 as his disability by this point was one of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.

The medical records with respect to the Claimant's knee condition are less clear due to the absence of surgery which would assist in identifying that point in time when the condition could be fairly said to have acquired permanent status. Dr. Ayres reported some improvement with

physical therapy on April 12, 1995 (CX 12 at 204), and his knee complaints appear to have subsided from that point until September 16, 1997 when he reported increasing knee pain over the preceding few weeks or months and was placed on temporary restrictions. CX 10 at 151-154. Thereafter, his knee complaints appear to have been superceded by more serious concerns with cervical and low back pain which resulted in additional restrictions through 1999. *Id.* at 157-192. Given the absence of any definitive medical opinions prior to November 6, 2000 when he was examined by Dr. Caldwell and found to have reached maximum medical improvement, I find it reasonable to use the date of Dr. Caldwell's examination as the date of permanency. Accordingly, I find that the Claimant's lower extremity disability was permanent as of November 6, 2000.

E. Compensation Due

As noted above, the first issue to be resolved in calculating the amounts of compensation is the date of the Claimant's knee injury which is determinative of the applicable average weekly wage on which compensation payments are based. *See generally Bath Iron Works Corp. Director, OWCP*, 506 U.S. 153, 155-58 (1993). In this regard, I reject the Employer's suggestion that the knee injury involved in this claim occurred in January or February 1995. Granted, the Claimant reported an accident in January 1995 when he twisted the right knee, and he also reported symptoms in his left knee one month earlier. However, the record shows that he never lost time from work and, after a short period of conservative treatment and physical therapy, he was able to return to work without knee-related restrictions until September 16, 1997 when he reported a recurrence of knee pain from kneeling on the job. On these facts, and noting that Drs. Caldwell and Brigham both expressed the opinion that the Claimant's patellofemoral syndrome developed gradually due to workplace conditions and not from any acute trauma, I find that the Claimant suffered an aggravation injury on September 16, 1997 when his exposure to conditions at work such as repetitive kneeling on hard surfaces culminated in knee symptoms which he could no longer tolerate. In making this finding, I recognize that Dr. Brigham has stated that it is probable that the Claimant would have developed the same extent of knee impairment regardless of his work activities between January 6, 1995 and September 16,1997. However, I find this unexplained statement to be inconsistent with Dr. Brigham's opinion that the patellofemoral syndrome evolved gradually due to workplace conditions, and I have accorded it little weight in determining when the Claimant's knee injury occurred for purposes of selecting the applicable average weekly wage.

Section 8(c) of the Act provides a compensation schedule, which is based on 2/3 of a worker's average weekly wage multiplied by a specified number of weeks, for the loss of enumerated body parts. In the case of the loss of an arm, section 8(c)(1) provides for 312 weeks of compensation; 33 U.S.C. §908(c)(1); and section 8(c)(2) provides for 288 weeks of compensation for the loss of a leg. 33 U.S.C. §908(c)(2). In a case such as this where the loss or loss of use is partial, compensation is based on the proportionate loss or loss of use of the member. 33 U.S.C. §908(c)(19). That is, the percentage of the Claimant's loss of use of his arm and legs must be applied to the number of weeks set forth in the corresponding subsection of section 8(c) for total loss to arrive at the proportionate number of weeks of compensation. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391-92 (1983), *aff'd in relevant part but rev'd on other*

grounds, 760 F.2d 569, (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513 (1986). For the partial loss of his right arm, 312 weeks is multiplied by .16 (the percent of loss) to arrive at 49.92 weeks of compensation entitlement which shall be paid at 2/3 of the stipulated average weekly wage of $452.42 for March 4, 1992. For the partial loss of his left arm, 312 weeks is multiplied by .02 (the percent of loss) to arrive at 6.24 weeks of compensation entitlement which shall also be paid at 2/3 of the stipulated average weekly wage of $452.42. Finally, for the partial loss of the use of each of his legs, 288 weeks is multiplied by .05 (the percent of loss) to arrive at 14.4 weeks of compensation entitlement for each leg which will be paid at 2/3 of the stipulated average weekly wage of $622.59 for January 16, 1997. Pursuant to section 8(c)(22), these awards of compensation will run consecutively. 33 U.S.C. §908(c)(22).

F. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). Accordingly, I find that the Employer is liable for all reasonable and necessary medical care as required by the Claimant for treatment of his work-related bilateral carpal tunnel syndrome and bilateral patellofemoral syndrome.

H. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *American Stevedores v. Salzano,* 538 F.2d 933, 937 (2nd Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer and Carrier will be granted 15 days from the filing of the fee petition to file any objection.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Bath Iron Works Corporation, shall pay to the Claimant, Michael J. Reid, permanent partial disability compensation benefits pursuant to 33 U.S.C. §908(c)(1) for a 16% loss of use of his right arm at the weekly compensation rate of $301.61, such compensation to commence on August 1, 1996 and to continue for 49.92 weeks;

2. Upon conclusion of the payments for the Claimant's right arm, the Employer shall pay to the Claimant permanent partial disability compensation benefits pursuant to 33 U.S.C. §908(c)(1) for a 2% loss of use of his left arm at the weekly compensation rate of $301.61 for a period of 6.24 weeks;

3. Upon conclusion of the payments for the Claimant's left arm, the Employer shall pay the Claimant permanent partial disability compensation benefits pursuant to 33 U.S.C. §908(c)(2) for a 5% loss of use of each leg at the weekly compensation rate of $415.06 for a total of 28.8 weeks;

4. The Employer shall pay the Claimant pursuant to 33 U.S.C. §907 for all reasonable and necessary medical care as required by the Claimant for treatment of his work-related bilateral carpal tunnel syndrome and bilateral patellofemoral syndrome;

5. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

6. The Claimant's attorney shall file, within thirty (30) days of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection; and

7. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd